In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1412

BIG RUN COAL & CLAY COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 30) is reported at 385 F. 2d 788. The Board's decision and order (Pet. App. 15–29) are reported at 152 NLRB 1144.

JURISDICTION

The order of the court of appeals was entered on November 13, 1967, and a petition for rehearing was denied on February 8, 1968 (Pet. App. 31). The petition for a writ of certiorari was filed on May 8, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

308-913—68

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board correctly held that the company violated Sections 8(a) (5) and (1) of the National Labor Relations Act by refusing to execute a written contract embodying the terms of an agreement which it had reached with the employees' statutory bargaining representative.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, *infra*, p. 10.

STATEMENT

1. On June 27, 1963,[1] following a Board-conducted election, the United Glass and Ceramic Workers of North America, AFL–CIO ("the Union"), was certified as the collective bargaining representative of the Company's production and maintenance employees (Pet. App. 17; B.A. 3a, 69a).[2] On July 8, William H. Poske, Jr., a Union representative, wrote to the Company requesting a collective bargaining meeting, and also requesting that the wage committeemen and the president of the local affiliate of the Union[3] be allowed time off to attend the negotiations (Pet. App. 18; B.A. 4a, 69a–70a).

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[1] All dates are in 1963 unless otherwise stated.

[2] "B.A." refers to the Board's Appendix filed in the court below.

[3] The Local referred to is Lexington Local No. 425, a duly organized affiliate of the Union, whose membership is limited to employees of the Company (Pet. App. 18; B.A. 4a).

At the first bargaining session on July 27, Poske submitted a draft of a contract which stated in its preamble (Pet. App. 19; B.A. 4a–5a, 31a, 63a):

> This agreement is between Big Run Coal & Clay Company for its Lexington, Kentucky, plant (hereinafter called the Company) and the United Glass and Ceramic Workers of North America, AFL–CIO–CLC and Lexington Local No. 425 (hereinafter called the Union).

This preamble appeared in all subsequent drafts of the contract, including the final draft which was mailed to the Company on December 31 (Pet. App. 19; B.A. 5a, 67a).

At the first eight of the nine bargaining sessions, Poske was accompanied by three representatives of the Local (Pet. App. 18; B.A. 4a, 44a–45a). Poske testified that the representatives of the Local were not bargaining agents for the Union (Pet. App. 18; B.A. 4a, 47a):

> I was there as the sole bargaining agent, I had this committee there with me, which we have in other negotiations for the purpose of becoming acquainted with union activities, for the purpose of public relations and for whatever information that they could give to me that I needed to bargain with. As for them being a part of the negotiating committee I would say no.

At no time was there any discussion between the Union and the Company negotiators concerning the negotiating authority of the Local representatives (Pet. App. 18; B.A. 4a, 47a).

Poske attended the last bargaining session on November 4 without the Local representatives, and advised the Company that he was "the sole bargaining agent and was prepared to consummate an agreement" (Pet. App. 19; B.A. 5a, 45a). The Company agreed to continue negotiations in the absence of the Local representatives, but Company President Coleman and Robert T. Caldwell, the Company's attorney, stated that any agreement reached by the parties would have to be ratified by the membership of the Local before the Company would sign the contract (Pet. App. 19; B.A. 5a, 43a–44a). Although Poske did not agree to this condition, the parties continued their negotiations and arrived at an understanding as to all the substantive terms of a collective bargaining agreement (Pet. App. 19; B.A. 5a, 28a–29a, 44a).[4]

On November 5, Caldwell mailed Poske a draft contract reflecting the agreement reached at the November 4 meeting (Pet. App. 20; B.A. 6a, 64a–66a). In his letter of transmittal, Caldwell stated (Pet. App. 20; B.A. 6a, 65a–66a):

> * * * [I]t was and is the Company's position that we should not enter into a contract covering the employees of our plant, who compose the certified bargaining unit, without their knowledge and approval. This is especially advisable in view of the reports now coming to us indicating that a majority of the employees may have withdrawn from the Union and that, at this time, you may not actually have a ma-

[4] Company President Coleman conceded that "[a]ll the substantive provisions of the collective bargaining agreement were reached by the parties on November 4" (B.A. 29a).

> jority of the bargaining unit. Under these circumstances, the Management is willing to execute the contract provided it has been presented to the membership of the bargaining unit and approved by them.

The Company's draft called for execution by the president and secretary of the Local in addition to the representatives of the Union (Pet. App. 20; B.A. 6a).

The Union prepared and executed a revised draft of the contract, and sent it to the Company for its signature on December 31 (Pet. App. 20; B.A. 6a, 66a–67a).[5] The signature page did not provide for execution by representatives of the Local (*ibid.*).[6] On January 7, 1964, Caldwell wrote to Poske, reaffirming the Company's position expressed in his letter of November 5, and returning the contract unsigned (Pet. App. 21; B.A. 7a, 68a–69a). President Coleman testified that the lack of ratification by the employees and the absence of any signature by the Local were the only reasons for the Company's refusal to sign the contract (Pet. App. 21; B.A. 7a, 38a).

2. The Board found that the contract mailed by the Union on December 31 embodied all understandings between the parties on the terms of a complete collective bargaining agreement, and that the Union, which was the certified bargaining representative, had not

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[5] The terms of the agreement had been modified in a minor respect during a telephone conversation between Poske and Caldwell on November 6 (Pet. App. 19; B.A. 5a, 29a).

[6] Although the contract did not specify the dates of its effectiveness or expiration, the parties stipulated that they had agreed that it was to be effective for a period of one year from the date of execution (Pet. App. 20; B.A. 6a–7a, 41a–42a).

agreed to add the Local as a party to the contract (Pet. App. 22–23). The Board held, moreover, that the Company's insistence on employee ratification could not be justified by its reliance on reports that the Union had lost employee support, because, since the Union's certification was less than one year old, its majority status could not be challenged in that manner (Pet. App. 21–22). Accordingly, the Board held that the Company violated Sections 8(a)(5) and (1) of the Act by refusing to execute the written contract as required by Section 8(d) (Pet. App. 24, 27). The Board ordered the Company to execute the contract and to give it retroactive effect (Pet. App. 28–29). The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. 30).

ARGUMENT

Petitioner's primary contention is that it had no duty to execute a contract which made no provision for signature by the Local because the Union had proposed, in the preamble to its draft, that the Local would become a party to the contract and the Company had accepted that provision (Pet. 6–9). Since the Union alone was the certified representative, however, the Company could not, over the Union's objection, condition the execution of an agreement upon the addition of the Local or upon obtaining employee ratification. See *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342. And the Board found (Pet. App. 22–23) that the Union had not agreed to make the Local a party to the contract. The only issue presented, therefore,

is whether substantial evidence supports that finding. This is not an issue warranting review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490–491. In all events, there is ample evidentiary support for the Board's finding.[7] Compare *Houchens Market of Elizabethtown, Inc.* v. *National Labor Relations Board,* 375 F. 2d 208, 210–211 (C.A. 6).

Contrary to petitioner's additional contention (Pet. 9–13) it was not relieved of its duty to bargan with the Union, including the duty to execute a written contract, because it had received reports "indicating that a majority of the employees may have withdrawn from the Union" (B.A. 65a). As this Court has held, an employer must ordinarily bargain with the certified

[7] The Board found (Pet. App. 23):

> * * * According to the uncontradicted testimony of Poske, the representatives of Local 425 attended the bargaining sessions merely in the capacity of observers and consultants and had no authority as negotiators. Furthermore, at the November 4 meeting, Poske specifically informed the Company representatives that he was acting "as the sole bargaining agent." Thus, any misapprehension on the part of the Respondent as to the status the Glass Workers were claiming for Local 425 was effectively dispelled before the conclusion of the negotiations. In the circumstances, despite the preamble to Article I of the various drafts of contract prepared in the course of the negotiations, the Company could not fairly have assumed (and no testimony was offered on behalf of the Respondent that its representatives had made any such assumption) that the Glass Workers was proposing, and was bargaining on the basis, that Local 425 would be included as a necessary party to their agreement and that the approval of Local 425 would be required as a condition to the successful conclusion of negotiations. * * *

representative for a period of one year from the date of the Board's certification, notwithstanding evidence of an intervening loss of majority support. *Brooks* v. *National Labor Relations Board*, 348 U.S. 96. Since the Union was certified on June 27, 1963, its majority status, absent exceptional circumstances not present here, could not be impeached at least until June 27, 1964.[8]

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[8] The cases relied on by petitioner (Pet. 10–13) are distinguishable. In *Philip Carey Mfg. Co.* v. *National Labor Relations Board*, 331 F. 2d 720 (C.A. 6), certiorari denied, 379 U.S. 888, the certification year had ended and a strike had resulted in the permanent replacement of a substantial number of union supporters. The court found that the employer's refusal to bargain during the last two months of the certification year did not warrant a bargaining order "[i]n view of the lengthy good faith bargaining which has transpired, the expiration of the certification year, and the Union's loss of its majority status." 331 F. 2d at 735. In *National Labor Relations Board* v. *Florida Citrus Canners Cooperative*, 288 F. 2d 630 (C.A. 5), reversed on other grounds, 369 U.S. 404, the court relied on the facts that the union alone was responsible for the impasse in bargaining and that it had demonstrably lost its majority status. 288 F. 2d at 633, 639. The instant case, however, involves simply a refusal by the Company, six months after the certification, to execute a contract with the Union, based on nothing more than Company's assertion that its employees "may" have withdrawn from the Union (*supra*, pp. 4–5).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1968.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

UNFAIR LABOR PRACTICES

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

Sec. 8(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. * * *

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